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Filing date: **10/30/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205076
Party	Defendant Rafael Robert Vargas
Correspondence Address	JON JEKIELEK JEKIELEK & JANIS LLP 153 WEST 27TH STREET, SUITE 204 NEW YORK, NY 10001 UNITED STATES jon@jj-lawyers.com
Submission	Motion to Reopen
Filer's Name	Jon D. Jekielek, Esq.
Filer's e-mail	jon@jj-lawyers.com
Signature	/Jon D. Jekielek/
Date	10/30/2013
Attachments	Reply Affirmation JDJ 10.30.13.pdf(192839 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

-----X
WINSTON ROSA,

Plaintiff,

-against-

RAFAEL ROBERT VARGAS.,

Defendant
-----X

Opposition No.: 91205706

Serial No.: 85480930

Mark: FULANITO

Filed: November 25, 2011

Published: May 8, 2012

**AFFIRMATION OF
JON D. JEKIELEK, ESQ.**

JON D. JEKIELEK an attorney duly admitted before this Court, hereby affirms the following under penalties of perjury:

1. I am the attorney for defendant Rafael Robert Vargas ("Vargas" or "Defendant") and, in this regard, have personal knowledge of the facts and circumstances contained in this affirmation and know all such facts and circumstances as stated herein to be correct.

2. I respectfully submit this affirmation in reply to the Plaintiff's Opposition to Defendant's Motion to Reopen the Time for All Parties to Conduct Discovery, to Submit Pre-Trial Disclosures and to Re-Open each Parties 30 Day Trial Period in this matter pursuant to Rule 6(b) of the Federal Rules of Civil Procedure (the "Motion") and to Strike the Plaintiff's Testimony from the Record.

3. The Defendant incorporates its original Motion papers by reference and all exhibits annexed thereto.

4. In opposition to the Motion, the Plaintiff has submitted testimony of the facts related to the discovery process signed by r. Winston Rosa, which attached two exhibits. The testimony provided by Mr. Rosa is deficient in that it (1) was not signed before a notary; (2) does not state that the testimony is believed to be true; (3) it is not affirmed under the penalties of

perjury; (4) it is not accompanied by a brief; and (5) it does not include a certificate of service. Based on the foregoing, the Defendant raises the issue of to the TTAB of the admissibility of the Plaintiff's response and submits that the TTAB should consider the Motion as unopposed.

5. While the Defendant stands by the facts, law and arguments set forth in its original Motion, it must address some of the factual inaccuracies set forth in the Plaintiff's opposition papers in this reply.

6. The Plaintiff admits that it filed its witness list the day after Plaintiff's Pretrial Disclosures were due, and that in and of itself should be sufficient to warrant the TTAB's striking of the witness list from the record, however, that in itself is not the issue raised by the Defendant's Motion. Rather, the Defendant submits that the testimony submitted by the Plaintiff of Mr. Rosa Caba should be stricken from the record and not considered by the TTAB for the following reasons (1) the Plaintiff NEVER served initial disclosures at any time in this matter, which is a prerequisite to conducting discovery; (2) the deposition of Mr. Rosa Caba was taken on July 9, 2013, well after discovery closed on April 25, 2013; and (3) the testimony submitted by the Plaintiff was not filed with the TAB until July 31, 2013, after the Plaintiff's 30 Day Trial Period closed on July 24, 2013.

7. All of the aforementioned deadlines were set forth in the TTAB's August 27, 2012 Discovery Conference Order. See Original Jekielek Aff. at Ex. B. As a result of the Plaintiff's failure to file the testimony in the time expressly Ordered by the TTAB, it should be stricken from the record.

8. With respect to Mr. Rosa's testimony that his father, Mr. Rosa Caba is "not in good health and that it would prove difficult to bring him in again and go through the rigorous task of a new deposition" this is the type of testimony that should have been provided by Mr. Rosa Caba

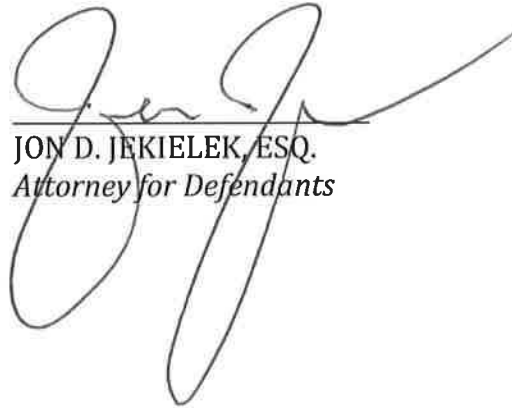
directly. There is no explanation as to the nature of his illness or the severity. The Defendant has no knowledge of Mr. Rosa Caba's health, and if permitted would work out any number of reasonable methods to conduct this deposition. If the Plaintiff had these concerns, one would reason that his deposition would have been taken during the time permitted by the TTAB and as provided for in the TTAB's August 27, 2012 Order.

9. Additionally, the email annexed to the Plaintiff's Opposition papers as Exhibit B is not admissible for any purpose as it relates to settlement discussions between the parties. *See* Federal Rules of Evidence, Rule 408.

10. Finally, of great importance is the testimony by Winston Rosa in his opposition papers that he has been "blocked from using the trademark that I helped build as 50% owner ad legal partner at WinDose International." This statement is goes to the heart of this dispute – who owns the Trademark "Fulanito" – and the Defendant admits that he is NOT the owner of the Trademark "Fulanito". At best, per his own statement against interest, the Plaintiff is a fifty (50%) percent owner of the Trademark. Of course, the Defendant disputes that the Plaintiff is the lawful owner of any percent, but this statemetns should be considered by the TTAB when rendering its decision of this case on the merits should it not grant the Defendant's Motion.

11. Based on the foregoing, the Defendant respectfully requests the Court grant Defendant's Motion to Reopen the Time for All Parties to Conduct Discovery, to Submit Pre-Trial Disclosures and to Re-Open each Parties 30 Day Trial Period in this matter pursuant to Rule 6(b) of the Federal Rules of Civil Procedure (the "Motion") and to Strike the Plaintiff's Testimony in the form of the deposition transcript of Mr. Rosa Caba from the Record.

Dated: New York, New York
October 30, 2013



JON D. JEKIELEK, ESQ.
Attorney for Defendants

UNITED STATES PATENT AND TRADEMARK OFFICE
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CERTIFICATE OF SERVICE

On October 30, 2013, I served a true copy of the, the Affirmation of Jon D. Jekielek, Esq., by sending them via electronic mail and by mailing the same via first class mail, with postage prepaid thereon, and depositing it with an authorized United States Post Office box within the State of New York addressed to the Plaintiff as indicated: Mr. Winston Rosa, 2190 Boston Road, Apartment 3-J, Bronx, NY 10462.

Dated: New York, New York
October 30, 2013

JEKIELEK & JANIS, LLP

By: 
Jon D. Jekielek, Esq.
153 West 27th Street, Ste. 204
New York, New York 10001
Tel: (212) 686-7008
Fax: (646) 657-3265
Jon@jj-lawyers.com

Attorneys for Rafael Robert Vargas